UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	)	CASE NO. 16-14469
	)	
BRIAN T. MIZWAY,	)	CHAPTER 7
	)	
NICOLE E. MIZWAY,	)	JUDGE PAT E. MORGENSTERN-CLARREN
	)	
Debtor(s).	)	**MOTION OF U.S. BANK NATIONAL ASSOCIATION FOR RELIEF FROM STAY AND ABANDONMENT**
	)	
	)	PROPERTY ADDRESS: ** 287 Wallace Drive Berea, OH 44017

U.S. BANK NATIONAL ASSOCIATION (the "Movant") moves this Court, under Bankruptcy Code §§ 361, 362, 363, and other sections of Title 11 of the United States Code, under Federal Rules of Bankruptcy Procedure 4001 and 6007, and under Local Bankruptcy Rule 4001-1 for an order conditioning, modifying or dissolving the automatic stay imposed by Bankruptcy Code § 362 and for Abandonment of Property Under Bankruptcy Code § 554.

MEMORANDUM IN SUPPORT

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2). The venue of this case and this Motion is proper under 28 U.S.C. §§ 1408 and 1409.

2. On August 26, 2009 the Debtors Brian T. Mizway and Nicole E. Mizway obtained a loan from **Howard Hanna Mortgage Services, an Ohio Corporation** in the amount of $120,280.00. Such

loan was evidenced by a promissory note dated August 26, 2009, (the “Note”), a copy of which is attached as Exhibit A.

3. To secure payment of the Note and performance of the other terms contained in it, the Debtors Brian T. Mizway and Nicole E. Mizway executed a Security Agreement in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Howard Hanna Mortgage Services, an Ohio Corporation dated August 26, 2009 (the “Security Agreement”). The Security Agreement granted a lien on the real property, **located at** 287 Wallace Drive, Berea, OH 44017 owned by the Debtors Brian T. Mizway and Nicole E. Mizway (the “Collateral”). The Collateral is more fully described in the Security Agreement (check one):

☒ attached as Exhibit B;

OR

☐ contained in the Note, attached as Exhibit A.

4. The lien created by the Security Agreement was duly perfected by (check all that apply):

☒ Filing of the Security Agreement in the office of the Cuyahoga County Recorder on August 28, 2009.

☐ Filing of the UCC-1 Financing Statement in the office of ____________________________ on (DATE).

☐ Notation of the lien on the Certificate of Title.

☐ Other (state with particularity)_______________.

A copy of the recorded Security Agreement, UCC-1 Financing Statement, Certificate of Title or other document, as applicable, is attached as Exhibit B. Based on Debtors' Schedules, the lien is the 1st lien on the Collateral.

5. The entity in possession of the original Note as of the date of this motion is U.S. BANK NATIONAL ASSOCIATION.

6. The entity servicing the loan is: U.S. Bank National Association.

7. The Note was transferred, as evidenced by the following:

a. If the Collateral is real estate:

i. Under Uniform Commercial Code § 3-203(a) as applicable under state law in effect where the property is located, from the original lender (check only one):

☐ N/A.

OR

☒ By endorsement on the Note, payable to U.S. Bank, National Association.

The indorsement of Howard Hanna Mortgage Services herein was signed by Phyliss Hilger as "Operations Manager".

As Movant is a successor entity, it has no direct knowledge of the authority granted to Ms. Hilger. As stated by the Court of Common Pleas of Ohio, Montgomery County, "[a]s a general proposition of law, …when a corporation allows it to appear that the officer or agent has the authority to perform certain business transactions, the corporation is bound by those acts, even though he in fact lacks such authority" Real Estate Capital Corp. v. Thunder Corp., 287 N.E.2d 838, at 842. Movant, having purchased the Note from Howard Hanna Mortgage Services in good

faith, relies upon the authority of that entity's officer to endorse the note, either as being duly authorized to do so, or by the corporation ratifying his action via the subsequent transfer of the original note to Movant.

Additionally, the Ohio Revised Code, in Section §1303.23(A) states that a negotiation is "effective even if it is obtained in any of the following manners: (1) From an infant, a corporation exceeding its powers, or any other person without capacity; (2) By fraud, duress or mistake of any kind; (3) As part of an illegal transaction; (4) In breach of duty." So, even if Ms. Hilger did not have the proper authority to do so, the negotiation she made is effective under the Ohio Revised Code.

Furthermore, under O.R.C. §1303.36(A), unless the authenticity of, and authority to make a signature on an instrument is specifically denied in a pleading, it is admitted. Should no party in this case file a responsive pleading to the within Motion in which they deny the authenticity or authority to make the indorsment, the signature on the indorsement should be admitted.

Finally, pursuant to Federal Rule of Evidence 902, as made applicable by Federal Rule of Bankruptcy Procedure 9017, "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (9) commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law." This applies to promissory notes, as discussed by the 6th Circuit Court of Appeals, which stated that such evidence is "self-authenticating" in the case of In re Cook, 457 F.3d 561, at 566.

OR

☐ By blank endorsement on the Note.

OR

☐ By allonge attached on the Note, payable to ___________________________.

OR

☐ By blank allonge, attached to Note.

OR

☐ The Note is not endorsed to the Movant, or is not endorsed in blank with an allegation that the Movant is in possession of the original note. The factual and legal basis upon which the Movant is entitled to bring this motion is (explain with particularity and attach supporting documentation) _____________________________________.

☐ By endorsement on the Note or by allonge attached to the Note, through a power of attorney. If this box is checked, a copy of the power of attorney is attached as Exhibit _. Explain why it provides Movant the authority to endorse the Note:
____
____
_____________________________________.

ii. Under Uniform Commercial Code § 3-203(a) as applicable under state law in effect where the property is located, **the Note is endorsed in blank by U.S. Bank National Association, however U.S. Bank National Association is in possession of the Note and is entitled to enforce it.**

iii. A court has already determined that Movant has the ability to enforce the Note with a judgment dated ____________ in the _____________________. A copy of the judgment is attached at Exhibit _.

iv. Other___________________________ [explain].

b. If the Collateral is not real estate (check one):

☐ N/A.

OR

☐ From the original lender to _________________________________ by _____________________________________.

8. The Security Agreement was transferred as follows (check one):

☐ N/A.

OR

☒ From the original lender, mortgagee, or mortgagee's nominee on August 23, 2013 and **recorded on September 4, 2013** to U.S. Bank National Association. The transfer is evidenced by the document(s) attached to this Motion as Exhibit C.

9. The value of the Collateral is $122,500.00. This valuation is based on Cuyahoga County Auditor.

10. As of **August 19, 2016**, there is currently due and owing on the Note the outstanding principal balance of $111,821.94, plus interest accruing thereon at the rate of 6.000% per annum from September 1, 2014, as described in more

detail on the worksheet. The total provided in this paragraph cannot be relied upon as a payoff quotation.

11. The amount due and owing on the Note as set forth in paragraph 10 **does not** include a credit for the sum held in a suspense account by the Movant. The amount of the credit is $0.00.

12. Other parties known to have an interest in the Collateral besides the debtor(s), the Movant, and the trustee are (check all that apply):

☐ N/A.

☒ The Cuyahoga County Treasurer, for real estate taxes, in an unknown amount.

☐ Co-Debtor ____________________

13. The Movant is entitled to relief from the automatic stay under Bankruptcy Code § 362(d) for these reason(s) (check all that apply):

☐ Debtors have failed to provide adequate protection for the lien held by the Movant for these reasons:
____

☐ Debtors have failed to keep the Collateral insured as required by the Security Agreement.

☐ Debtors have failed to keep current the real estate taxes owed on the Collateral.

☒ Debtors have failed to make periodic payments to Movant for the months of October, 2014 through August, 2016, which unpaid payments are in the aggregate amount of $29,451.86 **as of August 19, 2016. Additional months may come due between the filing of this motion and the hearing on the motion. Those additional amounts will be due at that time**. The total provided in this paragraph cannot be relied upon as a reinstatement quotation.

☒ Debtors have no equity in the Collateral, because the Collateral is valued at $122,500.00, and including the Movant's lien, there are liens in an aggregate amount of $137,078.76 on the Collateral.

☐ Other cause (set forth with specificity):______________________.

14. Movant has completed the worksheet, attached as Exhibit D.

15. **Debtors executed a promissory note secured by a mortgage or deed of trust. The promissory note is either made payable to Creditor or has been duly indorsed. Creditor, directly or through an agent, has possession of the promissory note. Creditor is the original mortgage or beneficiary or the assignee of the mortgage or deed of trust.**

16. Movant is entitled to an order directing the trustee to abandon the Collateral under 11 U.S.C. §554(b) for these reasons (check all that apply):

☐ The Collateral is burdensome to the estate because __________________.

☒ The Collateral is of inconsequential value and benefit to the estate because upon liquidation of the Collateral no proceeds will remain for the benefit of the estate.

WHEREFORE, Movant prays for an order from the Court:

(a) granting Movant relief from the automatic stay of Bankruptcy Code § 362 to permit Movant to proceed under applicable nonbankruptcy law; AND

(b) AUTHORIZING AND DIRECTING THE CHAPTER 7 TRUSTEE TO ABANDON THE COLLATERAL UNDER BANKRUPTCY CODE § 554.

Respectfully submitted,

/s/ Edward A. Bailey
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CERTIFICATE OF SERVICE

I certify that on October 24, 2016 a true and correct copy of the Motion for Relief from Stay was served:

Via the Court's Electronic Case Filing System on these entities and individuals who are listed on the court's Electronic Mail Notice List:

1. Office of the U.S. Trustee at (Registered address)@usdoj.gov

2. Lauren Helbling on behalf of the Chapter 7 Trustee's office at lauren@helblinglpa.com

3. Kenneth A. Blech, Esq. on behalf of Brian T. Mizway and Nicole E. Mizway, Debtors, at kenblech@ameritech.net

And by regular U.S. mail, postage prepaid, to:

4. Brian T. Mizway and Nicole E. Mizway, Debtors at 8843 Fair Street, Strongsville, OH 44149

5. Cuyahoga County Treasurer at 1219 Ontario St., Room 300, Cleveland, OH 44113

/s/ Edward A. Bailey
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